

NO. 49413-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH E. ELLISON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 49413-2-II

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the defendant was in custody and had not yet been placed on community custody, was an additional offender score point added erroneously for purposes of calculating the defendant's offender score?
2. Should this case be remanded for resentencing when the sentencing court incorrectly calculated the defendant's offender score?

B. STATEMENT OF THE CASE.

1. Procedure

Joseph Ellison, hereinafter "defendant," was charged with escape in the first degree, for having escaped from the alternative to confinement program. CP 1. Following a jury trial, the defendant was convicted as charged. CP 54, 59-75.

At sentencing, the State submitted certified copies of the defendant's prior convictions for purposes of his offender score. CP 78-221; RP 108-109¹. The offender score was calculated as a four. CP 59-75 (Sec. 2.3). The court sentenced the defendant to the Drug Offender Sentencing Alternative (DOSA) program finding that DOSA was

¹ The verbatim reports of proceedings are contained in one report and all proceedings are included.

“appropriate” considering the defendant’s offender score. CP 59-75; RP 104-106, 108-109.

2. Facts

On June 29, 2015, the defendant was sentenced to the Alternative to Confinement (ATC) sentence as the result of a drug offense guilty plea. Exh. 2. He entered ATC as required on July 1, 2015, and agreed to the program’s terms and conditions. RP 42-43; Exh. 1. He subsequently completed intake and signed into the program on July 3. RP 33-34.

On July 6, Donna Burwell, the defendant’s ATC case manager, attempted to call the defendant to remind him about a urinalysis test. RP 30. The defendant hung up on her the first time she called. *Id.* She then called a second time and left a voicemail. *Id.* Thereafter the defendant did not show up for his urinalysis test as required and did not attempt to make contact or check-in again with ATC. RP 31.

After the defendant failed to check-in with ATC, Deputy Scott Mook attempted to contact the defendant using the information the defendant provided at intake. RP 49; Exh. 1. However, the deputy was unable to locate the defendant. RP 49. Deputy Mook filed an escape report due to failure to comply with the rules and requirements of ATC. RP 50.

C. ARGUMENT.

1. ALTHOUGH THE DEFENDANT WAS SENTENCED TO ALTERNATIVE CONFINEMENT IN THE COMMUNITY, HE WAS NOT CONSIDERED TO BE ON COMMUNITY CUSTODY.

A sentence within the standard sentence range for an offense shall not be appealed. RCW 9.94A.585(1), *State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796 (1986). A defendant may, however, challenge an incorrectly calculated offender score. *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010).

A sentencing court acts without authority when it imposes a sentence based upon a miscalculated offender score. *State v. Johnson*, 180 Wn. App. 92, 99-100, 320 P.3d 197 (2014). A defendant that has been erroneously sentenced must have his case remanded for resentencing. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004).

Offenders convicted of a nonviolent and nonsex offenses sentenced to one year or less, may have jail time converted to time spent in an available county supervised community option. RCW 9.94A.680(3). Community custody begins when either (a) the term of confinement is complete; or (b) at the time of sentencing if no term of confinement is ordered. RCW 9.94A.707(1). If an individual commits an offense while under community custody, one point is added to their offender score. RCW 9.94A.525(19).

Here, the defendant was sentenced to a period of confinement of six months plus one day in the county jail. Exh. 2 (Sec. 4.5). This was converted to ATC. *Id.* Not more than 72 hours after his release from ATC the defendant was to report to DOC for community custody. Exh. 2 (Sec. 4.6). The defendant was to be on community custody for a period of 12 months. *Id.*

The defendant elected not to stipulate to his offender score. CP 56-58; RP 108. Based on a proposed stipulation the offender score was calculated by adding one point for each of the defendant's prior felony convictions and one point for community custody. CP 56-58. This was error.

An individual can be charged with escape in the first degree when they fail to be where they are supposed to be. *State v. Guy*, 87 Wn. App. 238, 243, 941 P.2d 674 (1997) (quoting *State v. Kent*, 62 Wn. App. 458, 461, 814 P.2d 1195 (1991)). This is separate from violating the terms of community custody. For the latter, all that is required is that an individual willfully does not make themselves available to the department that supervises them. RCW 72.09.310.

There is a statutory distinction between ATC and community custody. RCW 9.94A.680; RCW 9.94A.701. As such, the State concedes that the defendant should not have had a point added to his offender score for a community custody violation. He was not on community custody at the time. Thus, the defendant's offender score is miscalculated.

2. THE PROPER REMEDY FOR A
MISCALCULATED OFFENDER SCORE IS TO
REMAND FOR RESENTENCING.

Since the defendant's offender score was miscalculated, it follows that he was erroneously sentenced. As such, the proper remedy is for the case to be remanded for the sentencing court to sentence the defendant based upon his accurate offender score. Here, the defendant asks for relief by simply having his offender score corrected and the community custody point removed. *See* Brf. of App. at 12. However, no authority is cited stating that having the offender score corrected is the proper remedy. The Supreme Court "...has long held 'the existence of an erroneous sentence requires resentencing.'" *In re Call*, 144 Wn.2d 315, 333, 28 P.3d 709 (2001) ((citing *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (citing *Brooks v. Rhay*, 92 Wn.2d 876, 877, 602 P.2d 356 (1979))). Hence, the proper remedy is not to merely remove the point for community custody, but rather remand in order for the sentencing court to resentence the defendant with an offender score of three.²

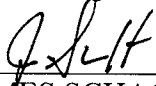
² There is no dispute that the defendant's offender score is a three. The only challenge defendant brings to his offender score is the one point being added for being on community custody at the time of the offense.

D. CONCLUSION.

Because the court miscalculated the defendant's offender score, the proper remedy is to remand to the sentencing court to resentence the defendant based upon his correct offender score of three.

DATED: Monday, April 24, 2017

MARK LINDQUIST
Pierce County
Prosecuting Attorney



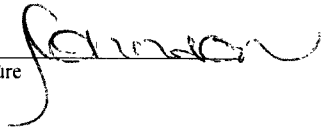
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

 17298 for

NATHANIEL BLOCK
Legal Intern

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